

TITLE 85
BOARD OF UNIVERSITY AND SCHOOL LANDS
ARTICLE 85-06
SUBSURFACE MINERAL LEASING

Chapter 85-06-07

POTASH AND OTHER SUBSURFACE MINERALS
SOLUTION MINING

Section

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85-06-07-01. DEFINITIONS. The terms used throughout this chapter and in documents used pursuant herewith have the same meaning as in the North Dakota Century Code Chapters 15-05, 15-08.1, 38-09, 38-11.2 38-12 , and 61-33, including:

1. **"Arm's length transaction"** means a transaction between parties with adverse economic interests where each party to the transaction is in a position to distinguish his economic interest from that of the other party and does not mean a transaction made by a corporation or other entity with itself, or a parent, subsidiary, or interrelated corporation or entity, or between partners or co-joint ventures, or between corporations or other entities having interlocking directorships or close business relationships which may compromise their individual interests.
2. **"Board"** means the board of university and school lands.
3. **"Commissioner"** means the commissioner of university and school lands.
4. **"Completion"** means, in the case of a subsurface mineral well, when the first commercial marketable quantity is produced through surface equipment into tanks from the ultimate producing interval after casing has been run.
5. **"Fund"** means any one of the various trust funds or assets under the control and jurisdiction of the board.
6. **"Byproducts"** means all potassium, sodium, phosphorus and other chemical substances of a similar occurrence and their salts and compounds.
7. **"Extraction Facility"** means any well or mine or other extractive process operated for the purpose of recovering subsurface minerals
8. **"Gross proceeds"** shall be the sum of all consideration in whatever form or forms, paid for the potash and byproducts attributable to the lease.
9. **"Leased premises"** means the land area subject to a given potash lease under the authority of the board of university and school lands.
10. **"Lessee"** means the party specified in a potash lease as the lessee, and his permissible assignees or other successors in interest.
11. **"Lessor"** means the state of North Dakota acting by and through the board of university and school lands and its agent, the commissioner of university and school lands.

12. **"Market value"** means the price a willing buyer would pay a willing seller in an arm's length transaction in which the buyer is not compelled to buy or seller is not compelled to sell without deductions of any kind including transportation discounts.
13. **"Net mineral interest"** means all or that undivided portion of the total subsurface mineral estate in a tract of land, the title to which is in the state of North Dakota acting by and through the board of university and school lands.
14. **"Solution Mine"** means the extraction of soluble minerals from subsurface strata by injection of fluids, and the controlled removal of mineral-laden solutions.
15. **"State Land Department"** means the office of the commissioner of university and school lands.
16. **"Subsurface minerals"** means all naturally occurring elements and their compounds, volcanic ash, precious metals, carbonates, and natural mineral salts of boron, bromine, calcium, fluorine, iodine, lithium, magnesium, phosphorus, potassium, sodium, thorium, uranium, and sulfur, and their compounds, but does not include hydrocarbons (i.e. oil and gas), sand and gravel and rocks crushed for sand and gravel.
17. **"When run"** means that point in the time when the production from a well is removed or sold from the leased premises and delivered to the purchaser or user of such production; for purposes of computing royalties, that point in time shall be considered to be 7:00 a.m., local time, on the day the production is delivered to the purchaser or user regardless of the actual time delivered.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented

85-06-07-02. LEASE APPLICATIONS. Lease applications in writing, by facsimile transmission, or by electronic email, may be made only for tracts not already leased for the production of subsurface minerals as shown on the tract books of the state land department, except applications may be accepted for a tract already under lease when it appears that such lease will expire prior to the date of the lease sale. An application shall be accompanied by a nonrefundable application fee of \$50.00 per tract plus other fees specified in section 85-06-07-14 of this chapter and shall indicate the bonus offered. The bonus offered will serve as a bid in the auction. Each tract is limited to a maximum of one quarter section within the same quarter or governmental lots corresponding thereto within the same section. Applications of more than one quarter section will be divided and considered a separate application. Applications not accompanied by the application fee and not in the proper form shall be rejected. All applications are to be submitted to the State Land Department, P.O. Box 5523, Bismarck, North Dakota 58506-5523 (telephone no. 701-328-2800).

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-02.1 SOVEREIGN LANDS. Notwithstanding section 85-06-07-02, a lease application for navigable lakes and streams may include up to a section if the tract or tracts cannot reasonably be subdivided by quarter or half section. Sovereign lands lease acreage, including islands, may be offered for lease as, more or less, and may be adjusted for accretions, relictions, or avulsive changes, as survey information is obtained, the ordinary high watermark is delineated, and other reliable relevant facts are identified. Lease acreage adjustments will be limited to within the same quarter section, half section or section.

General Authority
NDCC 15-05-09 and NDCC 61-33-06
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-06-03. ADVERTISEMENT AND PUBLIC AUCTION. Prior to the offering of subsurface mineral leases for sale, the commissioner shall publish notice of the sale in the official newspaper of the county or counties in which lands for lease are located, and in the Bismarck Tribune. The notice must be published once each week for two weeks, the last publication being at least ten days prior to the day of the lease sale. The advertisement shall specify the date, time and place of the lease sale; and shall specify how any interested person may obtain a list of the tracts that are being offered for lease. Bidding shall be on the basis of such bonus as the bidder may offer. Every subsurface mineral lease granted by the commissioner shall be issued to the successful bidder as soon as possible after collected funds are received from the successful bidder. Before any lease shall be issued the successful bidder shall, no later than seven calendar days from the conclusion of the auction, pay five years rental, the bonus, and the advertising fee specified in section 85-06-07-14. Should publication of any notice be inadvertently omitted or should such notice as published contain typographical errors, the commissioner may proceed with the scheduled leasing where it appears that the omission or error is not prejudicial to the fund.

Bids may be accepted electronically for a subsurface mineral lease sale. The highest of those bids received in writing before an electronic auction will be the opening bid of a particular tract of minerals. Land Department personnel may not bid incrementally on anyone's behalf.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-04. REJECTION OF APPLICATIONS AND BIDS. The commissioner may reject any and all applications or bids at any time prior to the issuance of a lease.

General Authority
NDCC 15-05-09
History: March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-05. FORM AND TERMS OF LEASE. Leases shall be issued on forms furnished by the commissioner. All leases shall be made for a term of not less than five years and shall continue in effect under the terms thereof for as long as potash and subsurface minerals may be produced from the leased premises in commercial quantities or for as long as extended as provided therein. The lease may provide for a reasonable shut-in clause, force majeure clause, and drilling and reworking continuation clause. The lease shall provide for a bonus of not less than \$1.00 dollar per acre and an annual delay rental of not less than one dollar per acre per year based on the acreage shown in the records of the state land department at the time the lease is issued. The lease shall provide for a royalty of two and one-half percent (2.50%) of all potash and subsurface minerals produced from the leased premises without deductions of any kind, regardless of the place of sale. The fraction of percentage established by the board as a royalty shall be construed to mean such fraction or percentage of the net subsurface mineral interests. The lease may contain such terms and conditions as the board or commissioner, acting on behalf of the Board, shall deem appropriate.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-06. POOLING OR UNIT AGREEMENTS. The board, or commissioner acting on behalf of the board may enter into an agreement for the consolidation of the leased premises with other lands for the purpose of joint development and operation of an entire consolidated area as a unit. Such agreement shall provide that the leased premises shall share in the royalty on potash and other subsurface mineral substances produced from a consolidated tract in the proportion that the leased premises bears to the total area of such unit, or upon such other royalty sharing basis as may appear equitable to the board. The operations or production on such an area shall have the same effect as operations or production under the terms of each such lease included therein. All such agreements must be submitted to and approved by the board or the commissioner acting on behalf of the board.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-06-07. ASSIGNMENTS AND RELEASES. All leases may be assigned or released in whole or in part. An assignment, when submitted to the board for approval, shall be executed and acknowledged in the same manner prescribed for the conveyance of interests in real estate and shall be filed in duplicate with the commissioner. One copy shall be filed in the state land department and a duplicate returned to the assignee. The approval of the board acting by and through the commissioner shall be noted upon all copies. All lease obligations of assignor must be current at the time such assignment is approved. Upon payment of the then current assignment fee and upon approval of an assignment by the board, lessee shall be relieved of all obligations with respect to assigned portions. Provided all lease obligations are current at the time a release or partial release is made, all lease obligations and liabilities shall cease as to the released portions.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09
15-05-15

85-06-07-08. ROYALTIES. If a sale of potash or any other subsurface mineral substance produced or manufactured from the leased premises does not constitute an arm's length transaction, the royalties due the lessor shall be as follows: Two and one-half percent (2.50%) without deduction for the cost of producing, gathering, storing, separating, treating, dehydrating, vapor recovery, compressing, processing, transporting, conditioning, removing impurities, depreciation, risk capital, and otherwise making the potash and other subsurface mineral products produced hereunder ready for sale or use.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09
15-05-10

85-06-07-08.1. DISPUTED TITLE ROYALTY ESCROW ACCOUNT. Any lessee, assignee, or entity that assumes, or agrees to perform, any of the lessee's rights and responsibilities under the lease, that proposes to withhold royalty payments based upon an ownership dispute must establish an escrow deposit account and must deposit the disputed payments into this account. The account must be established at the Bank of North Dakota, or other state or national chartered insured financial institution approved by the Commissioner, with the Board as a party to the escrow agreement. Upon final resolution of the dispute, and with consent of the Commissioner, the escrow agent shall be authorized to release all monies held in the account to the entity that established the escrow account for proper distribution to the rightful owners. The Board shall be entitled to any interest income earned on the account attributable to the State's ownership interest. This section applies to matters where the amount of the disputed royalties is ten thousand dollars or more over a twelve (12) month period. This section may apply to leases executed prior to the effective date of this section if agreed to by the Commissioner and the lessee, assignee, or entity that assumes, or agrees to perform, any of the lessee's rights and responsibilities under the lease.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09
15-05-10

85-06-07-09. BREACH OF LEASE. The board may pursue any legal remedy for nonpayment of any sum due under the lease or for breach of any of the terms or conditions of a lease. In addition, the board may cancel any lease for nonpayment of any sum due under the lease or for breach of any of the terms or conditions of a lease provided that such cancellation shall not release lessee from liability for any sum due lessor or from any damages on account of the breach. Before a lease shall be canceled, the commissioner, at the direction of the board, shall mail to the lessee by registered or certified mail addressed to the post office address of such lessee as shown by the records of the state land department, a thirty (30) day notice of intention to cancel such lease, specifying the reason for cancellation. If lessee shall not have remedied the default within thirty (30) days after receipt of such mailing, the commissioner, with board approval, may enter cancellation upon his records. A lease shall be canceled only after reasonable attempts have been made to secure voluntary payment of any sum due and compliance with the lease terms and conditions. The pursuit of one remedy shall not bar the pursuit of other remedies. The commissioner may, in writing, waive any breach of a lease except such terms and conditions as are required by law, but any such waiver shall extend only to the particular breach so waived and shall not limit lessor's rights with respect to any future breach. Notwithstanding the foregoing, failure to pay the annual delay rental by the date due shall result in automatic termination of a lease. An annual mineral lease rental payment shall be considered paid if the payment is postmarked or received in the office of the Commissioner on the day the payment is due. If for any reason a payment is received in the office of the Commissioner more than seven calendar days after the date the payment was due, the lease involved shall automatically terminate effective as of the date the payment was due.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-10. REPORTS OF LESSEE - DELINQUENCY PENALTY. Lessee shall immediately notify the commissioner in writing when a permit to drill a well on the leased premises has been issued and shall indicate the location of the proposed well. Immediately upon obtaining production of potash and subsurface minerals in commercial quantities, the producing lessee shall notify the commissioner in writing, giving the date production was commenced. Within ninety (90) days following initial production of oil and within one hundred twenty (120) days following initial production of gas, lessee shall file with the commissioner a production and royalty statement showing total production and indicating the royalty due together with payment of such royalty. Thereafter, such statement and payment of royalty shall be due each month on or before the last day of the month succeeding each month of production. These time limits may be extended by the commissioner for good cause. The commissioner may request other information and to require that such reports be made on forms furnished by the commissioner. Any sum, other than annual delay rentals, not paid when due shall become delinquent and will be subject to a delinquency penalty of one percent (1%) of such sum for each thirty (30) day period of delinquency or fraction thereof.

In addition to the delinquency penalty, unpaid royalties also bear interest in accordance with N.D.C.C. 47-16-39.1. The commissioner may initially seek to collect either the delinquency penalty or interest, or both. Failure to seek collection of both penalty and interest shall not constitute a waiver of the right to seek the full amount of both penalty and interest if the initial claim is not satisfactorily settled. At such time as a claim for unpaid royalties, if any, and penalties and interest is settled and payment received, the amount of penalty and interest not collected shall be deemed waived. In addition to the discretion to seek only penalty or interest in the initial claim for payment, the commissioner may, for good cause waive up to \$2500 of the penalty or interest initially sought. In determining whether good cause exists, the commissioner may consider one or more of the following: the reason for the late payment; the degree of control the payor had over the late payment; any unusual or mitigating circumstances involved; and any other relevant factors. Only in extremely rare circumstances will the commissioner consider waiving penalty or interest below the equivalent of the loss of interest earnings to the trust fund involved. Requests for interest or penalty waivers in excess of \$2,500 shall be presented to the Board, with the commissioner's recommendation thereon, for review and decision. Lessor shall have a first lien upon all oil and gas produced from the leased premises to secure payment of all unpaid royalties or other payments that may become due under this lease.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-11. AUDITS AND INSPECTIONS. The cuttings, cores, and well logs of all wells on the leased premises and all books, accounts, receipts, and discharges of all wells, tanks, pools, meters, pipelines, and all contracts and other records pertaining to the production, transportation, sale, and marketing of the subsurface minerals or other products produced on the leased premises shall at all reasonable times be subject to examination and audit by the commissioner or his representative.

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

85-06-07-12. THE PROTECTION OF ARCHAEOLOGICAL, HISTORICAL AND PALEONTOLOGICAL RESOURCES. Where an archaeological, historical, or paleontological resource is known at the time of leasing and needs to be protected, the board's potash lease will include a stipulation requiring that, at least twenty (20) days prior to beginning any surface disturbance on the leased premises, the lessee shall notify the state land department of the location of the intended surface disturbance. The state land department shall, based upon advice from the North Dakota Historical Board according to N.D.C.C. § 55-02-07, notify the lessee of the

protection requested to preserve the resource. If the lessee objects to the requested protection, the lessee may present its objection to the state land department. The commissioner, subject to appeal to the board, shall make the final determination as to what protection or preservation measures must be undertaken before surface disturbance begins. The board's subsurface mineral leases shall also contain a provision stating that in those instances in which a historical, archaeological, or paleontological resource, not known at the time of leasing, is discovered by the lessee during its operations on the leased premises, the lessee shall immediately stop work and do nothing to disturb or alter the resource. Upon discovery of such a resource the lessee shall immediately notify the state land department. The lessee shall not resume work until the state land department notifies the lessee what protective measures, if any, the commissioner may require to preserve or protect the resource. The lessee shall comply with all protective measures required by the commissioner or the board pursuant to this section. For the purposes of this section "surface disturbance" means any disturbance of the top soils or subsoil.

General Authority
NDCC 15-05-0
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09
55-02-07

85-06-07-13. (Reserved for future use)

85-06-07-14. FEES. The following fees may be charged:

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| 1. For filing application to lease or other applications | \$50.00 (per tract) |
| 2. For filing each set of lease assignments | \$50.00 (per tract) |
| 3. For photostatic copies | \$.25 (per page) |
| 4. For certified copies | \$10.00 |
| 5. For advertising costs per tract | \$10.00 |

General Authority
NDCC 15-05-09
History: Effective March 31, 2011

Law Implemented
NDCC 15-05-09

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